JOHN JACOB VOLRICH 89/4

Vancouver, B.C.
Called to the Bar May 17, 1952

Discipline Hearing Committee: March 24, 25, 26 and April 4, 1986 and March 24, 1987
D.A. Silversides, Q.C., Chairman, M.R. Mondin and G.L.F. Somers

Benchers: July 3, 1987

Summary

The member wrongfully converted client trust funds to his own use, and breached his undertaking and the terms of a Court Order, either deliberately or by gross negligence. On one occasion he loaned clients money and took security for the loan without recommending that they obtain independent legal advice. The member also breached several Law Society accounting rules by permitting debit balances in his trust account, failing to perform monthly trust reconciliations, and failing to render accounts to clients.

Facts

1. Breaching His Undertaking and a Court Order

In April, 1983 the member's firm was acting for Mr. C in a matrimonial dispute. On April 26 a Supreme Court Judge ordered that Mr. C's one-half share from the sale of the matrimonial home be placed in an interest-bearing account to stand as security for his maintenance payments to Mrs. C. An associate of the member who appeared in this matter advised the member of the terms of the court order.

The solicitor for Mrs. C sent Mr. C's share of the proceeds to the member on his undertaking to hold them in trust. The money was placed in a 30-day term deposit which expired and failed to earn interest after July 11, 1983. On that date, the member converted $3,000 of the term deposit proceeds to his own use for legal fees, contrary to his undertaking, the court order and without first delivering a bill to Mr. C. Subsequently he made four payments totalling $2,650 from the term deposit proceeds to Mr. C, again in breach of his undertaking and the court order.

On November 4 the member purchased a second term deposit with the balance of the proceeds. That deposit expired on March 23, 1984 and was left a further seven and one-half months without being re-invested and without earning interest.

In November 1984, after the member had withdrawn from the case, he sent an accounting to Mr. C's new solicitor of his disposition of the funds.

2. Converting Client and Estate Money

In May, 1983 the member was granted a general and enduring power of attorney by his client, V, entitling the member to, among other things, deal with her bank accounts.

V executed a will on June 29, 1983, appointing the member as her sole executor and conferring on him discretion to distribute her estate to her relatives and others. The member prepared and was a witness to the will. On July 4 and 5 two doctors certified that V was mentally disordered and she was committed to hospital.

On October 6, 1983 the member, as V's attorney, closed her two bank accounts and transferred the combined balances of $47,007.70 to a different bank account in the name of “J. Volrich in trust re: V” (the V trust account).

The member subsequently withdrew $15,000 of the money in trust for V and, with an additional $15,000 of his own money, purchased Canada Savings Bonds worth $30,000. None of these bonds was held by the member as trustee for V.

On November 24 the member deposited into the V trust account $67,005.76, the net proceeds from the sale of V's house. On the same day he converted $10,000 by depositing it in a joint account belonging to him and his wife. He was not entitled to this money.

On February 10, 1984 the member redeemed a $3,600 term deposit belonging to V. He converted the principal plus interest to his own use by taking $200 of the proceeds in cash and depositing the remainder of $3,701.01 to his joint account.

In November, 1984, while in the process of moving his office from downtown Vancouver to Kerrisdale, the member closed out the V trust account, withdrawing the balance of $12,938.82. He converted these funds to his own use by depositing them to another joint account in the name of him and his wife.

3. Failing to Recommend Independent Legal Advice

The member made an interim loan of $74,000 to two of his clients, Mr. and Mrs. K, to enable them to purchase a house. The loan was secured by a $62,000 first mortgage at 15% interest and a $16,000 second mortgage bearing 15% interest and having a $4,000 bonus in favour of the member.

The member did not recommend to Mr. and Mrs. K that they seek independent legal advice regarding the loan or the terms of the two mortgages.

4. Breaching Accounting Rules

(a) Debit Balances in Trust

An audit of the member's practice conducted in May, 1984 revealed that the member had permitted debit balances in individual client accounts from July, 1983 to January 31, 1984. During this period he also failed to perform monthly trust reconciliations although he attempted to do so.

(b) Failing to Render Accounts

During 1983 the member made three transfers totalling $29,791.57 from his trust to his general account to pay legal fees or to reimburse his practice for money advanced for client disbursements. Each of these transfers comprised the money of several clients.

The member prepared accounts for these transfers but did not mail or deliver them to the clients in a number of instances.

Decision

The member was guilty of wrongful conversion, professional misconduct and breach of the Law Society Rules.

Reasons

1. Breaching His Undertaking and a Court Order

The Hearing Committee had a reasonable doubt as to whether the member deliberately breached the terms of the court order or was grossly negligent in failing to make notes of the advice given to him by his associate and in failing to look at the order to ascertain its terms.

Based on the ratio of the B.C. Court of Appeal in *Poy and Totzauer* v. *Law Society of B.C.*, the Committee concluded that to be guilty of “wrongful conversion” within the meaning of the *Barristers and Solicitors Act*, a member must deliberately and either dishonestly or fraudulently convert money or other property entrusted to or received by him in his capacity as a member. Conversion arising from gross negligence does not constitute “wrongful conversion.”

The Committee found that the member, in converting $3,000 to his own use and paying $2,650 to Mr. C contrary to his undertaking and the terms of a court order, was guilty of conversion amounting to professional misconduct, but not amounting to wrongful conversion.

2. Converting Client and Estate Money

The member wrongfully converted to his own use money held in trust for his client V, and later her estate, in the amounts of $15,000, $10,000, $200 and $3,601.01 during 1983 and 1984.

The Hearing Committee had reasonable doubt as to whether the member had *fraudulently or dishonestly* converted the $12,938.82 of V's estate to his own use in November, 1984. For this reason, his conversion of those funds amounted to professional misconduct but not wrongful conversion.

3. Failing to Recommend Independent Legal Advice

The Hearing Committee noted that neither the *Professional Conduct Handbook* nor the Rules specifically obliged a solicitor to recommend or ensure that a client obtains independent legal advice before lending money to the client or taking security for the loan.

The Committee went on to consider the impact of Rulings B/9 and B/13 of the *Handbook* and of the relevant caselaw. It concluded that a solicitor may have a duty *to ensure* that a client obtains independent advice from another solicitor before lending money to the client or taking security, especially where the loan will yield a high rate of interest or the terms of the security are onerous.

In this case, where there was no evidence that the interest rate on the loan was higher than the market rate or that the terms of the mortgages were onerous, the member's duty was *to advise* Mr. and Mrs. K that they should seek independent advice before he gave them the loan or took the mortgages as security. His failure to do so constituted professional misconduct.

The Committee noted that a solicitor's duty to recommend independent legal advice before lending a client money would not exist where the solicitor advances money to a client to pay disbursements for the client and, pursuant to an agreement with the client, charges interest on the money at a rate no higher than the prevailing market rate.

4. Breaching Accounting Rules

(a) Debit Balances in Trust

The member breached Chapter 5, Article 1(a) of the Law Society Rules (now Rule 830) by failing to maintain sufficient moneys on deposit to meet all of the member's obligations with respect to funds held in trust for clients. He further breached Chapter 5, Article 1.6(a) (now Rule 860) by failing to perform monthly trust reconciliations.

(b) Failing to Render Accounts

Chapter 5, Article 1.4(a)(iii) (now Rule 835) requires that a member render an account to a client before withdrawing money for fees. On a consideration of the law, the Hearing Committee determined that, for a bill to be rendered, it must be delivered to the client. A solicitor's duty to deliver a bill will be fulfilled, however, by completing an action which he or she honestly and reasonably believes will result in delivery, such as mailing the bill to the client's current address.

The Committee was of the view that the Rule would not be breached:

- where the client's whereabouts are not known to the solicitor after reasonable and diligent efforts to locate him or her prove unsuccessful; or
- where the client has, for good reason, instructed the solicitor not to deliver a bill.

In the present case, the member's failure to render accounts constituted a breach of the Rules.

Penalty

The Hearing Committee would have disbarred the member but he refused to consent to the Committee's jurisdiction to impose penalty. The matter was therefore referred to the Benchers for determination.

The Benchers considered the matter of penalty on July 3, 1987.

They heard testimony from a psychiatrist who had treated the member since October, 1985. The psychiatrist said the member was obsessed with the death of his son from cancer and was in a very severe agitated

depression. In the psychiatrist's view, at the time the member mishandled trust funds, he would have been incapable of exercising good judgment or coping with the functional things of life.

In addition to the psychiatric evidence, the Benchers considered letters attesting to the member's good character, professional record and public service throughout his years of practice.

At the close of evidence and submissions, the Benchers ordered that the member be suspended for two years on the condition that he:

1. not be issued a practising certificate at the end of his suspension until he has satisfied the Credentials Committee that he is medically fit to practise law;
2. open practice as an employee in a setting to be approved by the Credentials Committee for a period of not less than one year after the issuance of a practising certificate, as determined by the Credentials Committee;
3. not be a signatory of any trust account for a period of one year following the issuance of his practising certificate;
4. not act as an executor, administrator, committee, trustee or attorney in fact during his period of suspension and for a period of one year after the issuance of his practising certificate;
5. not act as a principal to an articled student until permitted to do so by the Credentials Committee;
6. pay costs of the hearing totalling $20,000 within two years.

The member filed an appeal of the findings of fact and verdict of the Hearing Committee and of the penalty imposed by the Benchers. He abandoned that appeal on January 20, 1989.

A.G. Henderson, for the Law Society
D.A. Cave, for the member (as to findings of fact); the member on his own behalf (as to verdict); and L.E. Pierce (as to penalty).